

# Trustee decisions. What if trustees disagree?

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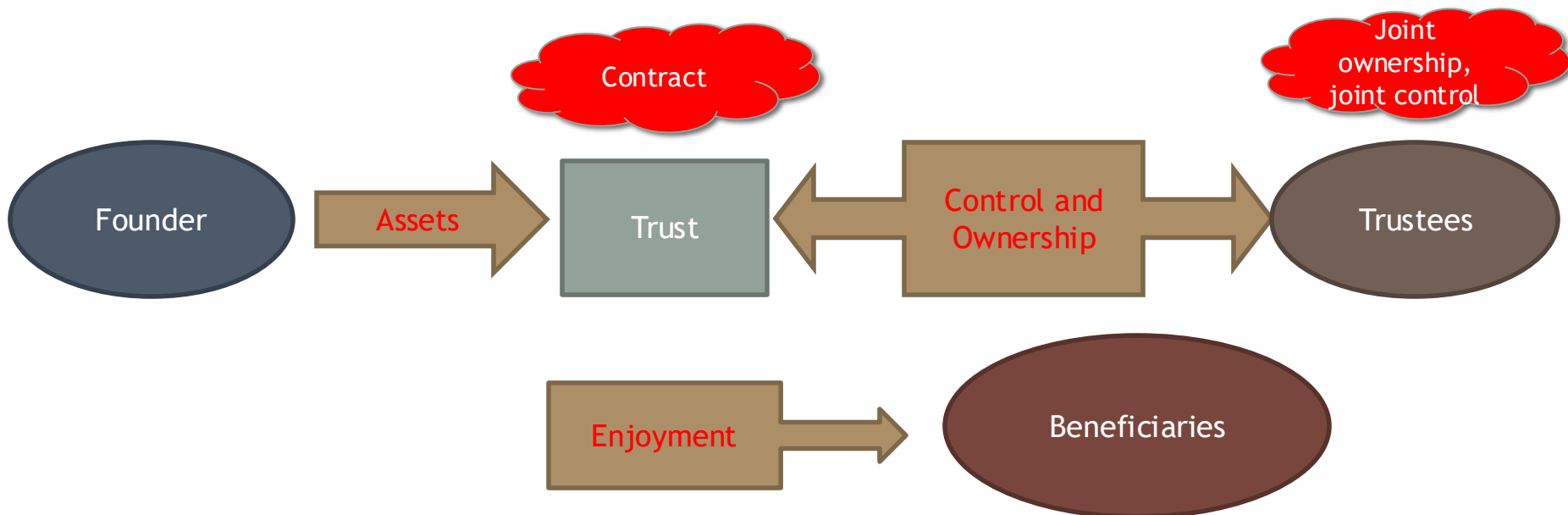


The trustees agreed to the terms of the trust deed. Have they ever read it????

# Structure of a trust

*Lupacchini N O and Another v Minister of Safety and Security* [2010] ZASCA 108; 2010 (6) SA 457 (SCA) para 1:

‘A trust that is established by a trust deed is not a legal person - it is a legal relationship of a special kind. That is described by the authors of Honore’s South African Law of Trusts as “a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose . . .”.’



Since co-owners must act jointly, trustees must also act *jointly* (Coetzee v Peet Smith Trust case of 2003 and Nieuwoudt v Vrystaat Mielies case of 2004)

# Some background

- ✧ Trust functions through appointed trustees and its lack of legal personality requires all trustees to act together for and on behalf of the trust
- ✧ Before latest judgement - Not majority vote but resolution (signed by entire complement of trustees) that binds trust
- ✧ Trust operates on resolutions; not on votes (Steyn v Blockpave case of 2011)
- ✧ General rule, co-trustees must act jointly, but co-trustee may, through delegation, authorise another trustee (or agent) to act on their behalf, only if trust instrument permits such a delegation and only if the full board of trustees retain ultimate responsibility for the outcome (Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd case of 1989)

## Some background (cont.)

- ✧ *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA); [2006] 4 All SA 129 (SCA) - SCA endorsed the principle that unless the trust deed provides otherwise the trustees must act jointly if the trust is to be bound by their acts.
- ✧ “The answer, I think, is that even if one regards the decision of the co-trustees to enter into the agreement of sale as no more than a matter of internal trust administration, the point remains that in the absence of a joint decision of the co-trustee (or the majority if that is all the trust deed requires), the assent of a single trustee will not bind the trust.”
- ✧ “A trustee who was not a party to the decision making process and who therefore has not authorized the contract would be free to contest the validity of the transaction.”
- ✧ Steyn v Blockpave case of 2011 - Distinction between internal and external business with outsiders. Although trustees may disagree internally on matter, they prohibited from disagreeing externally.
  - ✧ Internal matters may be debated and put to vote, thereafter voice of majority will prevail.
  - ✧ When trust required to deal with external business all trustees are required to participate in decision-making.

## Some background (cont.)

- ✧ When dealing with third parties, even if *trust instrument* stipulates that decision can be made by majority of trustees, all trustees required to be involved in decision (Land and Agricultural Bank of South Africa v Parker case of 2005).
- ✧ Parker case - “It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*, that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees’ joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly. Professor Tony Honoré’s authoritative historical exposition has shown that the joint action requirement was already being enforced as early as 1848. It has thus formed the basis of trust law in this country for well over a century and half.”
- ✧ Terms of trust instrument that provide for trustees to make decisions by majority vote at quorate meeting do not provide an exception to rule that all trustees must act jointly - they merely provide that *majority decision will bind minority/absent trustees*. Minority is, however, *obliged* to act jointly with other trustees in executing resolution adopted by majority (van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, van der Merwe NO and Others v Bosman and Others case of 2010)
- ✧ Check trust deed - Administrative procedures, such as calling and conducting trustees’ meetings, voting rights, decision-making and dispute resolution procedures, and veto rights
  - ✧ Failure = alter ego trust

# Trustees dealing on behalf of others

- ✧ After acting jointly, trustees may delegate certain functions to one or more while retaining responsibility for actions taken on their behalf.
  - ✧ Acting trustee becomes agent of board of trustees. Such authority may be express or implied.
  - ✧ If trust instrument is silent on matter whether one or more trustees can act on behalf of others, outsider will have to establish actual or implied authority - otherwise, trust will not be bound.
  - ✧ While trustees are allowed to authorise one or more of them to act on their behalf, it is question of fact in terms of whether they have done so - i.e. was necessary resolution done and duly signed by all trustees? (Costa v Arvum Exports case of 2017)
  - ✧ No Turquand rule
- ✧ Property transactions - if trustee(s) to sign agreement of sale and/or conveyancing documents required to give effect to transfer of property - authorised to do so by resolution signed by all other trustees (Thorpe v Trittenwein case of 2007).
  - ✧ Section 2(1) of Alienation of Land Act 68 of 1981 - no alienation of land shall be of any force or effect unless it is contained in deed of alienation signed by parties thereto, or their agents acting on their written authority.
  - ✧ Normally, where trust has more than one trustee, any deed of alienation entered into by that trust would require signature of all trustees
  - ✧ Alternatively resolution duly signed may authorise one or more trustees to sign on trustees' behalf - as trustees as regarded as "agents" in terms of Alienation of Land Act.

# Is a meeting always required?

- ✧ Resolutions stating “*At a trustee meeting*” - really?
- ✧ Discussed in le Grange case that nothing in trust deed suggests that donor intended ‘meeting’ to be restricted to “*meeting physically in the presence of one another*”, as donor could not have contemplated technological revolution since the creation of trust.
- ✧ “A majority decision is competent only if adopted by a majority of the trustees present at a quorate meeting of trustees. Whether such a “meeting” would need to be one at which the trustees attending were physically present together, or whether the “meeting” could be held in some alternative form, is a question which it is not necessary to decide. It is evident, however, that in order to qualify as “a meeting”, all the trustees in office would have to receive notice thereof so as to be able to participate in it if they so wished.” (van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, van der Merwe NO and Others v Bosman and Others case of 2010)
- ✧ van der Merwe case and confirmed in le Grange case - “even though the trust deed which provided that majority decisions would bind the dissenting or absent trustees it could not avoid the application of the rule that the ‘minority is obliged to act jointly with the other trustees in executing the resolution adopted by the majority”
- ✧ Therefore even dissenting trustee obliged to sign duly authorised resolution of board of trustees and cannot use that as mechanism to veto transactions

# Subsequent ratification

- ✧ Ordinary principle of law of agency - retrospectively (Meijer case of 2013)
- ✧ Ratification by full body of trustees - regarded as acting jointly (Hyde Construction CC v Deuchar Family Trust case of 2015)
- ✧ Ratify if:
  - ✧ Law allows
  - ✧ Trust instrument do not prohibit
  - ✧ Minimum number of required trustees authorised by Master - no lack of capacity
  - ✧ Person acted on behalf of other trustees
  - ✧ Full board ratifies - no reliance on 'majority rule'
- ✧ Can only cure authorisation of acts; not capacity
- ✧ Alter ego trust????

# le Grange v the Louis and Andre le Grange Family Trust case - obligation of acting jointly

- ✧ “Acting jointly means that the trustees must participate in the decisions taken on behalf of the trust.

*Participation usually involves meetings or consultations amongst trustees, negotiating or mediating contested decisions and ultimately in the absence of consensus or resolution contested issues are determined by a vote.*

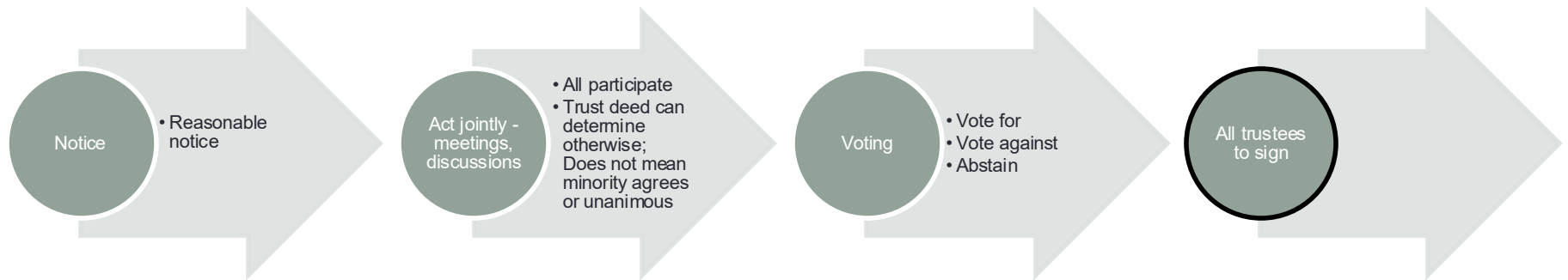
*Trustees may participate in a vote in three ways: vote for or against a motion or abstain from voting altogether. All three forms of participation in the decision-making are self-conscious and deliberative actions. Participation is elicited after proper notice to the trustees.*

*A trustee who has no knowledge of decisions taken or to be taken on behalf of a trust and consequently does not vote in any decision, cannot be said to have participated in decision-making on behalf of that trust. [So if knew and stayed away = abstain?]*

*Consequently, even if the majority of trustees arrive at a decision but without the participation of all the trustees, unless the trust deed authorises otherwise, the ensuing decision albeit a decision of the majority is not a decision on behalf of the trust.”*

- ✧ Trustees to present united front, irrespective of internal disagreement, in form of duly signed resolution by all trustees.
- ✧ Minority trustees must subject themselves to democratic vote of majority and co-sign the resolution taken by majority trustees.

# Practical steps (which make sense)



## Shepstone & Wylie case - High Court 2021

- ✧ Family in financial difficulty and divorcing
- ✧ 2 of 3 trustees arranged meeting to approve signing of surety in favour of attorneys acting for wife AND discuss contesting of FNB sequestration of trust
- ✧ Husband proposed and agreed to have meeting closer to where he lives; but never pitched - sufficient notice (“reasonable”) was given and difficult trustee accommodated - no reason not to participate in discussions - could also have had it digitally - he did not discharge his fiduciary obligation!!!
- ✧ 2 trustees went on and had the meeting and approved signing of surety in terms of trust deed power given to trustees
- ✧ Wife depended on 2 companies in liquidation and could not pay legal bills
- ✧ Shepstone & Wylie then called on the surety from trust for payment
- ✧ Trustees argued that they did not act unanimously ito trust deed and that resolution was not valid
- ✧ Shepstone & Wylie issued summons in the High Court for payment of their fees
- ✧ High Court agreed with trustees

# Shepstone & Wylie case - High Court (cont.)

## Clauses in trust deed

“2. The beneficiaries” mean THOMAS WILHELM VOLKER, RENATA MIGNON VOLKER (born SCHROEDER) and the lawful descendants of THOMAS WILHELM VOLKER.

## 4. TRUSTEES

There shall at all times be not less than three trustees of the Trust. The first Trustees shall be Thomas Wilhelm Volker, Renata Mignon Volker (born SCHROEDER) and MANFRED LOTHAR SCHUTTE who accept their appointment as such.

## POWER OF TRUSTEES

11.1. Any Trustee shall have the power to deal with the trust property and trust income for the benefit and purpose of the Trust in their discretion for which purpose they are granted all necessary powers and authority including (but without limitation) the powers stated in the appendix. The powers conferred upon the Trustees shall be complete and absolute and exercisable in the discretion of the Trustees;

11.2. The Trustees shall have the power to ratify, adopt or reject, in their discretion, contracts made on behalf or for the benefit of the Trust, either **before or after its formation. {GEE WHIZ!!!!}**

# Shepstone & Wylie case - High Court (cont.)

## Clauses in the trust deed

### MEETINGS OF TRUSTEES

13.1. The Trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Any Trustee shall be entitled on reasonable written notice to the other Trustees to summon a meeting of the Trustees. All Trustees for the time being in the Republic of South Africa shall be given reasonable notice of any meeting of the Trustees.

13.2. . . . [T]he quorum necessary at any such meeting shall be two Trustees. (as amended on 31 January 2000). {Court ignored this and argued that all trustees had to participate in meeting - biggest mistake of court; for them notice did not equal participation - therefore held that trustee did not act jointly}

13.3. A Trustee may be represented at a meeting of Trustees by a proxy appointed as such in writing.

13.4. A written resolution signed by all Trustees for the time being or their respective alternates or proxies shall be as effective as a resolution taken at a meeting of Trustees. {Also incorrectly used in SCA judgement}

### EXECUTION OF DOCUMENTS

14. All negotiable instruments, contracts, deeds and other documents which require to be signed on behalf of the Trust shall be signed in such manner as the Trustees shall from time to time determine, provided however that all such negotiable instruments, contracts, deeds and other documents shall be signed by at least two Trustees.

# Shepstone & Wylie case - High Court (cont.)

## Clauses in trust deed

### DISAGREEMENT BETWEEN TRUSTEES

16.1. At and for each meeting of Trustees, the Trustees present, in person or by proxy, shall elect a Chairperson; provided for as long as THOMAS WILHELM VOLKER is a Trustee, he shall be Chairperson. {NEVER ADDRESSED BY HIGH COURT OR SCA, BUT BY CONSTITUTIONAL COURT}

16.2 In the event of any disagreements arising between the Trustees at any time the view of the majority shall prevail. Should there be an equality of votes, the Chairperson shall have a second or casting vote. {GEE WHIZ!!!!} {Court said no disagreement at meeting, therefore could not then rely on majority vote, as husband did not disagree, he just stayed away)

### DISTRIBUTION OF INCOME AND TRUST PROPERTY

23.1. The Trustees shall use, pay or apply the whole or portion of the net income of the Trust, in such proportions and at such time or times as they in their sole discretion determine, for the welfare of all or any one or more of the beneficiaries;

23.2. As used in 23.1 above and 24 below, “welfare” shall, besides the ordinary meaning of the word, also mean the benefit, comfort, maintenance, education, advancement and pleasure of the beneficiaries and shall include in general all those matters and purposes which the Trustees in their discretion may consider to be in the interests or for the advantage of the beneficiaries.

24. The Trustees shall pay, use or apply the whole or portion of the trust property in such proportions and at such time or times as they in their sole discretion determine, for the welfare of all or any one or more of the beneficiaries.

# Shepstone & Wylie case - High Court (cont.)

## Clauses in trust deed

In addition, the 'Appendix to the Penvaan Property Trust' (the appendix) granted the following powers to the trustees:

### 'POWER TO THE TRUSTEES;

Without prejudice to the generality of any of the provisions of the accompanying deed constituting the above Trust the trustees shall have the following powers which shall be exercisable in their sole and absolute discretion for the purposes and benefit of the Trust, namely:

16. To guarantee the obligations of any beneficiary and/or any company of which the Trust and/or beneficiary is a shareholder and to bind the Trust as collateral security for any such obligation undertaken by the Trust, to mortgage, pledge or hypothecate any asset forming part of the trust property.

26. Provided the Trustees unanimously agree, to conduct business on behalf of and for the benefit of the Trust, and to employ trust property in such business.'

# Shepstone & Wylie case - Supreme Court of Appeal

- ✦ On 26 May 2023, Supreme Court of Appeal delivered judgment in matter between Shepstone & Wylie attorneys and trustees of Penvaan Property Trust.
- ✦ Strong reliance placed by Court on its interpretation (in many peoples' views incorrectly so) of the trust deed, which unfortunately was not well crafted.
- ✦ Supreme Court of Appeal held that “*in the case of trusts, joint and unanimous conduct in the alienation, handling and management of trust assets was a prerequisite*”.
- ✦ The provision of reasonable notice of the meeting was not enough to meet the participation requirement.
  - ✦ Minority trustee/s can basically use this mechanism to veto decisions of trustees
- ✦ The problematic trust deed may, therefore, to a degree be blamed for this adverse outcome for Shepstone & Wylie.

# Shepstone & Wylie case - Supreme Court of Appeal - Decision-making per trust deed

- ✧ Court ignored steps to be followed to constitute valid meeting (including fact that all trustees received notice and required quorum was present after various attempts by trustees who did cooperate) and solely relied upon fact that there was no disagreement between trustees present at meeting, and therefore majority decision rule was basically inapplicable in this instance.
- ✧ In the van der Merwe NO and others v Hydraberg Hydraulic CC case of 2010 court held that *“It is evident, however, that in order to qualify as ‘a meeting’, all the trustees in office would have to receive notice thereof so as to be able to participate in it if they so wished.”* Clearly, requirement was met in this case.
- ✧ Also confirmed that *“unanimity amongst the trustees is not required in order for decisions to be made effectively in respect of transactions concerning the administration of the trust and the dealing with its assets in terms of the powers conferred on the trustees in terms of clause 6 of the trust deed. It is sufficient if the relevant decision enjoys the support of a majority.”*
- ✧ Court held that *“in the case of trusts, joint and unanimous conduct in the alienation, handling and management of trust assets was a prerequisite”*. - Dangerous as minority can veto transactions

# Shepstone & Wylie case - Supreme Court of Appeal

- ✧ Shepstone & Wylie appealed to Supreme Court of Appeal -
- ✧ **Majority judgement** (Mbatha JA (Zondi and Mocumie JJA concurring)), held that - although trustees could **internally** take decisions by way of majority vote, that internal arrangement did **not operate in public sphere**.
- ✧ For the majority decision to have had effect, trustees would **all** have had to sign deed of surety, in absence of mandate by all trustees to one or more of them to do so
- ✧ Appeal dismissed with costs
- ✧ **MINORITY TRUSTEE CAN “VETO” TRANSACTIONS/DECISIONS BY NOT SIGNING, CHANGING LE GRANGE CASE**
- ✧ **Minority judgement**, Kathree-Setiloane AJA (Weiner JA concurring) held that appendix to trust deed required trustees to act jointly and unanimously in exercise of all their powers and therefore concurred with result, but for different reasons – **INCORRECT READING OF TRUST DEED**

# Shepstone & Wylie case - Constitutional Court - Aug 2025

- ✧ The Court concluded that a misstatement of the law by the Supreme Court of Appeal was sufficient to grant leave to appeal to this Court.
- ✧ Parker and Nieuwoudt
- ✧ After relying on Le Grange, the Supreme Court of Appeal majority stated that “[e]ven when the Trust Deed provides for a majority decision, the resolution must be signed by all the trustees”. This is plainly in conflict with the principle expressed in Nieuwoudt and Parker that a trust deed can provide for decision-making other than by joint action. The apparent reliance on Le Grange is misconceived. Le Grange stated that resolutions signed by trustees are “usually” a manifestation of trustees’ joint decision.
- ✧ The important part of the principle, namely that a trust deed can provide for decisions to be taken by fewer than all trustees, was overlooked by the Supreme Court of Appeal majority.
- ✧ The reliance on Blockpave is also misplaced. Blockpave is clearly wrong when it states that “externally trustees cannot disagree” and that in the external sphere a trust “functions by virtue of resolutions, which have to be supported by the full complement of the trust body”. As has now been stated repeatedly, trust law allows for a trust deed to provide for majority or quorate decision-making.

# Shepstone & Wylie case - Constitutional Court - Aug 2025 (cont)

- ✧ Very clear distinction between unanimous-decision trusts and majority-decision trusts
- ✧ The Constitutional Court held that when a majority-decision trust deed includes a standalone majority vote clause (as in the Van der Merwe and Le Grange cases), the trustees must act jointly but are not obliged to act unanimously. It also noted that where there is no standalone majority clause (as in the Parker case), the trustees must act both jointly and unanimously.
- ✧ The Constitutional Court was also of the view that the SCA introduced an unjustified distinction between decisions of trustees regarding internal and external matters, and in doing so, imposed an incorrect restriction on the proposition that the requirement of joint action can be modified by a trust deed.

# Shepstone & Wylie case - Constitutional Court - Aug 2025 (cont.)

- ✧ This does not mean that the third trustee does not need to be given reasonable notice, but it does mean that if reasonable notice is given and the third trustee does not attend, the other two may meet and “despatch business”.
- ✧ Only the views of those who attend a meeting can be relevant for purposes of a decision taken at such meeting.
- ✧ Since the two trustees at the meeting agreed that the Trust should conclude the suretyship, there was no disagreement engaging clause 16.2.
- ✧ The Chairman to be elected out of those present
- ✧ For round robin resolutions - The policy behind the requirement that all trustees must sign such a resolution is that, because a meeting is being dispensed with, a trustee who might disagree with a proposed decision is deprived of the opportunity at a meeting of persuading his or her fellow trustees. If, however, all the trustees agree on a course of action, the holding of a meeting would be superfluous. In short, clause 13.4 is irrelevant where a decision is taken at a meeting.

# Shepstone & Wylie case - Constitutional Court - Aug 2025 (cont.) THE MISTAKE

- ✧ The SCA majority stated, relying on the Le Grange case, that “*even when the Trust Deed provides for a majority decision, the resolution must be signed by all the trustees*”. The Constitutional Court held that this conflicted with the principle expressed in the Nieuwoudt and Parker cases that a trust deed can allow for decision-making other than by joint action
- ✧ It was of the view that the apparent reliance on the Le Grange case was incorrect, as Le Grange stated that resolutions signed by trustees are “usually” a manifestation of trustees’ joint decision. The Constitutional Court quoted the Le Grange case to hold that where (as on the facts of that case) the majority (being two trustees) had signed a resolution and the third abstained, it would be placing “form over substance” to insist on having the third trustee’s signature on the resolution. HOWEVER...

# Shepstone & Wylie case - Constitutional Court - Aug 2025 (cont.) THE MISTAKE

Appears if the Constitutional Court erred in its narrow quoting of the Le Grange case, that it would be “**form over substance**” to require the dissenting trustee/s to sign a resolution with the majority. The context of that quote pertains to a trustee whose signature did not appear on a resolution, but whose emails and behaviour confirmed support for the decision. It did not refer to the obtaining of the signature of a dissenting trustee. It was well-phrased in the Van der Merwe case, which was cited in the Le Grange case, that **even if majority decisions are allowed in a trust deed**, it does not remove the requirement that the “*minority is obliged to act jointly with the other trustees in executing the resolution adopted by the majority*”. In other words, they should be **invited** to trustee meetings and **allowed to participate** in decision-making, and even if they do not agree, they will be **bound by the majority decision** and required to cooperate and **sign the duly authorised resolution**. The Le Grange case, relying on the Van der Merwe case, held that “*the **obligation to act jointly does not imply that the minority has to agree with the majority or that votes have to be unanimous for any decision to be binding on the trust... Dissenting trustees must subject themselves to the democratic vote of the majority. Trustees have to present a united front irrespective of internal descent. Such ‘unity of purpose and function’ must be manifest publicly usually by a written resolution signed by all the trustees... Otherwise any other unambiguous, accessible form of communicating decisions of the trust possible in the information age will do... Physical presence at meetings is not required at all times but participation and input in the making of all decisions is essential. All that is required is that all trustees who are required to participate in the decision have an opportunity to do so and they would be bound by the decision of the majority participating in such a decision.***”

# Where does it leave trustees and even outsiders?

- ✧ Set up a proper, tailored trust deed - no copying and pasting
- ✧ Careful of building in false protections
- ✧ Read the trust deed
- ✧ It is advisable to allow a majority decision for day-to-day decisions in a trust but to reserve a unanimous decision for important decisions such as the amendment or deregistration of a trust
- ✧ Maybe quorum should be all trustees?
- ✧ Invite all trustees
- ✧ Give reasonable notice
- ✧ Give agenda points
- ✧ Follow steps in trust deed
- ✧ No alter ego trust please
- ✧ Outsider do your checking...

# Thank you!

[www.trusteeze.co.za](http://www.trusteeze.co.za)



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